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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~1373~~ 145

LEO GEORGE BECKER
and
JAMES JUDE TAGLIA,

Petitioners,

v.

PHILCO CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

LAIDLER B. MACKALL
JAMES V. DOLAN
1250 Connecticut Avenue
Washington, D. C.
Attorneys for Respondent

STEPTOE & JOHNSON
Washington, D. C.
KARL E. WOLF
Philadelphia, Pennsylvania
Of Counsel

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JAMES JUDE TAGLIA,

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v.

PHILCO CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 372 F.2d 771. The opinion of the United States District Court for the Eastern District of Virginia is reported at 234 F. Supp. 10. These opinions are attached as Exhibits A and B, respectively, to the Petition.

JURISDICTION

The jurisdictional grounds in this case have been adequately stated in the Petition.

QUESTION PRESENTED

The question presented in this case is not that stated by petitioners.

The narrow question instead is: *Does a tort action for libel lie against a private defense contractor fulfilling its governmentally imposed duty to inform the Government of suspected security violations?*

REGULATIONS INVOLVED

In addition to the Regulations set forth by petitioners, the following Armed Services Procurement Regulations are involved in this case. These regulations require insertion in all Government contracts whose performance involves access to classified information of the following contract clause:

> "(a) The provisions of this clause shall apply to the extent that this contract involves access to information classified 'Confidential' including 'Confidential–Modified Handling Authorized' or higher. * * * (c) To the extent the Government has indicated as of the date of this contract or thereafter indicates security classification under this contract as provided in paragraph (b) above, the Contractor shall safeguard all classified elements of this contract and shall provide and maintain a system of security controls within his own organization in accordance with the requirements of – (i) the Security Agreement (DD Form 441), including the Department of Defense Industrial Security Manual for Safeguarding Classified Information as in effect on the date of this contract, and any modification to the Security Agreement for the purpose of adapting the Manual to the Contractor's business; and (ii) any amendments to said Manual made after the date of this contract, notice of which has

been furnished to the Contractor by the Security Office of the Military Department having security cognizance over the facility." See 32 C.F.R. § 7.104-12 (1967) (Fixed Price Supply Contracts); 32 C.F.R. § 7.204-12 (1967) (Cost Reimbursement Type Supply Contracts); 32 C.F.R. § 7.302-25 (Fixed Price Research Contracts); 32 C.F.R. § 7.402-24 (1967) (Cost Reimbursement Type Research Contracts).

Also involved in this case are the Department of Defense Industrial Security Manual provisions referred to in the above Regulations:

"Paragraph 5. GENERAL REQUIREMENTS - The Contractor shall be responsible for safeguarding all classified information under his control. In the furtherance of this requirement, the contractor:

"a. Shall assure that classified information is furnished or disclosed only to authorized persons . . .

"b. Shall provide suitable protective measures within his facility for the safeguarding of classified information . . .

"Paragraph 6. REPORTS - The contractor shall submit immediately to the cognizant security officer - . . .

"b. A report, classified if appropriate, of any loss, compromise, or suspected compromise of classified information . . .

* * *

"d. A report, classified if appropriate, of any information coming to his attention concerning any of his employees having access, or who are in the process of being cleared for access, to classified information which indicates that such access is not, or would not be, clearly consistent with the interest of national defense . . .

"Paragraph 14.1. LOSS, COMPROMISE OR SUSPECTED COMPROMISE OF CLASSIFIED INFORMATION

"a. The contractor shall establish procedures to insure that each loss, compromise or suspected compromise of classified information is immediately re-

ported to the appropriate official of the contractor having responsibility for security within the facility . . .

"b. Immediately upon receipt of such a report, the contractor shall initiate an inquiry to ascertain all of the circumstances of the loss or compromise. . . .

"c. The contractor shall make an immediate report of the incident to the cognizant security office in accordance with paragraph 6.b."

STATEMENT OF THE CASE

These are simple tort actions for libel (consolidated below), based on a report submitted to the Department of Defense by respondent Philco Corporation. This report, of an actual or suspected breach by petitioners of Government security regulations regarding classified Government defense information, was required by respondent's defense contract with the United States and was submitted on an internal and confidential basis.

In order that defense contracts for the United States Department of Defense could be performed, certain State Secrets in the form of classified information relating to national defense matters were disclosed by the Government to Philco.[1] To insure against the loss or compromise of this classified information, the Government imposed upon Philco the express responsibility for safeguarding all such information through a system of security controls required specifically in the Armed Services Procurement Regulations, in Philco's contract with the Government, in the Security Agreement executed as a condition precedent thereto and finally in the Department of Defense Industrial Security Manual For Safeguarding Classified Information, expressly incorporated by reference in the Regulations, Contract and Security Agreement.[2]

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[1] Affidavit of Walter T. Skallerup, Appendix to Appellee's Brief to the Court of Appeals (hereinafter referred to as Appellee's Appendix), p. A. 1.

[2] Armed Services Procurement Regulations, see, e.g. 32 C.F.R., § 7.104-12; Skallerup affidavit, paras. 2, 3; Appellee's Appendix p. A. 2.

These provisions specifically required Philco to establish a security control system under the supervision of assigned security officers who were under obligation to report "any loss, compromise, or suspected compromise of classified information", all other actual or suspected security violations and all information concerning employees holding security clearances indicating they might be security risks.[3] Upon receipt of such a report Philco was required to investigate the circumstances of the alleged violation and then to make a report on the matter to the Department of Defense.[4]

Neither Philco nor its Security officers had any discretion in reporting suspected security violations or security risks. However, all reports submitted to the Department of Defense are treated as confidential documents, not distributed outside that Department and available within the Department only upon a strict "need to know" basis.[5]

The controversy in this case had its origin in a report submitted by the designated deputy security officer at Philco's Washington Office to Philco's Security Director, charging the petitioners, who at the time were Philco employees with access to classified information, with violating the Government's Industrial Security Regulations by compromising classified information.[6] Upon receipt of the report, Philco made an investigation[7] and in accordance with the procedure outlined above, submitted a confidential report on the matter to the Department of Defense.[8]

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[3]Department of Defense Industrial Security Manual, paras. 5, 14.1; Skallerup affidavit, paras. 3, 4, 5; Appellee's Appendix, pp. A.2 – A.5.

[4]Department of Defense Industrial Security Manual, para. 14.1(b)(c).

[5]Skallerup affidavit, para. 8; Appellee's Appendix, p. A.7.

[6]See affidavit of Joseph M. Transue, para. 2; Appellee's Appendix, pp. A. 11 – A. 12. See also Appendix to Appellants' Brief to the Court of Appeals; J.A. 8-9, 11.

[7]Transue affidavit, para. 2; Appellee's Appendix, pp. A. 11 – A. 12.

[8]Affidavit of Robert M. Jones, para. 7; Appellee's Appendix, p. A. 10.

Philco's report set in motion the Department of Defense's Industrial Personnel Access Authorization Review Procedures.[9] After an investigation and administrative hearing to determine the truth or falsity of the report's allegations, described in the Appendix to the Supplemental Brief of Appellee before the Court of Appeals, petitioners' Department of Defense security clearances were permanently suspended. These proceedings are the subject of a separate suit by petitioners against the United States, now pending in the United States District Court for the District of Columbia, and their legality or propriety is not involved here.

Petitioners' libel suit against Philco is based solely on this confidential report submitted, as required, to the Department of Defense. Philco moved in the United States District Court for the Eastern District of Virginia, where the action was brought, for summary judgment in its favor on the grounds the report was absolutely privileged: (1) as an act in performance of the governmental function of safeguarding national defense information which it was required to perform by Government Regulations and contract and; (2) as an integral part of the quasi-judicial administrative proceedings in the Department of Defense which the report set in motion. The District Court granted respondent's motion for summary judgment on the first of these two grounds and the United States Court of Appeals for the Fourth Circuit in unanimous opinion by Judges Bryan, Haynsworth and Sobeloff affirmed.

ARGUMENT

1. No Constitutional Issues Raised.

No claim of violation of any constitutional right was made by petitioners either in the trial court, in the Court of Appeals or in their petition filed in this Court. As the Court of Appeals states: "Our decision only determines that an action for libel will not lie in the circumstances against a

[9] Skallerup affidavit, para. 7; Appellee's Appendix, p. A. 6.

private party fulfilling its governmentally imposed duty to inform".

The petitioners do claim that the Security Clearance proceedings in the Department of Defense did not comply with Due Process requirements. However, as the Court of Appeals specifically noted, "Whether they [the administrative proceedings] give adequate redress or whether other remedies are available are questions not intended to be answered here". In any event, petitioners have instituted a separate suit against the Secretary of Defense in the United States District Court for the District of Columbia. It is only there that the Due Process issue, if it exists, can and should be determined – certainly not here.

2. There Is No Conflict of Decision.

Significantly, petitioners do not actually claim that the decision of the Court of Appeals conflicts with any relevant precedent, simply that there is no "decision by this Court" on the question presented.[10] Actually, as pointed out in the decision of the Court of Appeals, this case falls squarely within the doctrine of *Barr v. Matteo*,[11] that acts in performance of a governmental function are absolutely privileged and

[10] The Fifth Circuit decision in *Fowler v. Southern Bell Tel. & Tel. Co.*, 1965, 343 F.2d 150, holding that a private party is entitled to absolute privilege when performing a governmental function, is expressly in point and consistent with the Fourth Circuit's decision in this case. There are several decisions of the lower Federal courts supporting the present decision. See Appellee's Brief before Court of Appeals, p. 13 note 26. The only decision cited by petitioners to the Court of Appeals in an attempt to counter this line of authority was *Foltz v. Moore-McCormack Lines*, 2 Cir. 1951, 189 F.2d 537, cert. denied, 342 U.S. 871. That case is not in point and is not inconsistent with the decision in this case since *Foltz* involved *volunteered* information whereas Philco's report was *compelled* both by contract and regulations having the force and effect of law. Apparently for this reason, petitioners have abandoned their reliance on *Foltz* since the decision is not mentioned in their Petition here.

[11] 360 U.S. 564.

must not be made the subject of a libel action because those performing governmental functions "should be free to exercise their duties unembarrassed by the fear of damage suits"; that the application of this privilege is to be determined by the relationship of the acts to the "effective functioning of Government" rather than by who performs them; and that the complexities and magnitude of governmental activity have become so great that there must of necessity be a delegation and redelegation of authority. This decision was reaffirmed by this Court as recently as 1964 in *New York Times v. Sullivan*, 376 U.S. 254, 282, and is controlling here.

Again, as the Court of Appeals pointed out, the facts here present greater justification for granting an absolute privilege than those in *Barr v. Matteo*, since Philco's report was compelled both by Government regulation[12] and by Philco's contract with the Government, and it was not only submitted to the Department of Defense on a strictly internal and confidential basis[13] but handled in such a fashion by both the Department of Defense and respondent Philco Corporation.

Clearly there is no conflict of decision necessitating review by this Court.

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[12]It is established that the provisions of the Armed Services Procurement Regulations have the force and effect of law. *Paul v. United States*, 1963, 371 U.S. 245; *G. L. Christian & Assoc. v. United States*, Ct. Cl. 1963, 312 F.2d 418, cert. denied, 375 U.S. 954.

[13]The crucial importance of this distinction was recognized even by the principal dissenters in *Barr* who conceded that an internal, confidential, governmental report, such as here, is entitled to absolute privilege. 360 U.S. at 582.

3. No Broad or Important Questions of Law Affecting the Public Interest.

The Court of Appeals' decision in this case "only determines that an action for libel will not lie in the circumstances against a private party fulfilling its governmentally imposed duty to inform." This case is a private tort action – nothing more.

The fact that classified defense information potentially affecting the national interest happens to be involved here and that the mechanics of the Government's security program for protecting such information are also involved, does not mean that this tort action for libel *must* affect the public interest. The only material point here is the undisputed fact that the Government has no choice but to share with the private defense contractor joint responsibility for the protection of classified Government defense information released to the contractor for use in the performance of its contract. Obviously, this simple tort action is not the proper vehicle for challenging the Government's right to take appropriate steps to protect such information, including the delegation of authority necessary to accomplish this purpose, particularly since the Government is not a party to this action – unlike the situation with respect to the suit brought by these same petitioners against the United States to challenge the constitutionality of the Government's internal security administrative proceedings.[14]

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[14] The Court of Appeals' decision in this private tort action can also be justified on two other grounds which that court found unnecessary to discuss: (1) that Philco's report was absolutely privileged as an integral part of the quasi-judicial administrative proceedings in the Department of Defense which it set into motion, *Holmes v. Eddy*, 4 Cir. 1965, 341 F.2d 477, cert. denied, 382 U.S. 892, and other cases cited on pp. 26-33 of Appellee's brief before the Court of Appeals and; (2) that there was no actionable publication of the report since it was submitted to the Department of Defense on a strictly internal and confidential basis. *Holmes v. Eddy, supra.*

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

LAIDLER B. MACKALL
JAMES V. DOLAN
1250 Connecticut Avenue
Washington, D. C.
Attorneys for Respondent

STEPTOE & JOHNSON
Washington, D. C.
KARL E. WOLF
Philadelphia, Pennsylvania
Of Counsel